



May 4, 2001

Ms. Sara Shiplet Waitt  
Senior Associate Commissioner  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2001-1816

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146966.

The Texas Department of Insurance (the “department”) received a request for “[s]urvey results of the Race-Based Premium policies, stemming from the NAIC investigation led by FL Insurance Commissioner Bill Nelson.” You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. Additionally, you assert that the requested records may contain proprietary information that is protected from disclosure under section 552.110 of the Government Code. You state that you have notified all third parties of the request for information pursuant to section 552.305 of the Government Code. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation was pending or reasonably anticipated on the date that the department received the request for information, and (2) the information at issue is related to that

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<sup>1</sup>We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

litigation. Gov't Code § 552.103(c); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You state that the department anticipates that it will initiate administrative litigation under the Texas Administrative Procedure Act against over thirty insurance companies suspected of engaging in "race-based pricing" of certain life insurance policies. You explain that in preparation for this litigation, the department has sought information from these insurance companies through written inquiries pursuant to section 38.001 of the Insurance Code. You further explain that the responses to these written inquiries are sometimes referred to as survey responses or survey results. Based on your representations and our review of the submitted representative sample of information, we find that you have adequately shown that the department reasonably anticipates litigation for the purposes of section 552.103 and that the requested information relates to the anticipated litigation.

We note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information and such information must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). Here, you acknowledge that each insurance company has seen the information it generated and provided to the department. However, you state that "no company has been privy to information provided by other companies" and that "[a]s a result, not all parties to the anticipated litigation have had access to the requested information." You explain further that each insurance company's response to the department's written inquiry is relevant to the anticipated litigation against the other companies suspected of engaging in race-based pricing. Based on your arguments, we agree that although each insurance company has seen the information it submitted to the department, the department continues to have a litigation interest in the information as it has not been obtained by all the parties to the anticipated litigation. Therefore, the department may withhold the requested information under section 552.103. However, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).<sup>2</sup>

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<sup>2</sup>Because section 552.103 is dispositive of this matter, we need not address the arguments submitted by the third parties pursuant to section 552.305. We note, however, that some of the requested information may be confidential by law and must not be released even after litigation has concluded. If you receive a subsequent request for the information, you should reassert your arguments against disclosure at that time. Gov't Code § 552.352 (distribution of confidential information is criminal offense).

Finally, we note that you state that the race-based pricing information provided to the department by American National Insurance Company has been determined in Open Records Letter No. 2001-0277 (2001) to be excepted from disclosure under section 552.103 of the Government Code. Assuming that the four criteria for a "previous determination" by this office established in Open Records Decision No. 673 (2001) have been met, you must withhold this information in accordance with the previous ruling.<sup>3</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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<sup>3</sup>The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. See Open Records Decision No. 673 (2001).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/rr

Ref: ID# 146966

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